

Defamation as a Language Crime

—A Sociopragmatic Approach to Defamation Cases in the High Courts of Justice of Spain

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Abstract

The investigation of language crimes is one of the expert areas of forensic linguistics as a forensic science that analyses language as evidence. This paper focuses on a particular type of language crime: defamation. This is an offence perpetrated, primarily, with malicious language—either written language (libel), spoken language (slander), or technospeech (Garfield, 2011: 17)—that involves social emotions and intentional false communication and harms a person's dignity, prestige, and reputation in the social community. Since the 1980s, linguists have tried to shed light on defamation as a language crime from various linguistic theories such as speech act theory, semantics, discourse analysis, and pragmatics, as shown in works by Durant (1996: 195–210), Hancher (1980: 245–256), Kniffka (2007: 113–148), Shuy (2010) and Tiersma (1987: 303–350). In this paper, we take a different path in suggesting a sociopragmatics-based approach to the analysis of defamation, with special reference to impoliteness (Culpeper, 2011; Spencer-Oatey, 2005: 95–119). The questions we discuss are: (1) Is the theory of impoliteness appropriate for evidencing actionable offence in cases involving defamation? (2) How do the High Courts of Justice of Spain appraise defamatory meaning? (3) Does conventionalised formulaic impoliteness promote guilty verdicts? And (4) Does non-conventionalised impoliteness support acquittals? This piece of research is grounded in empirical data, particularly in a corpus of 150 judgments for cases of defamation given by the High Courts of Justice of Spain between 2013 and 2017.

Keywords

forensic linguistics, High Courts of Justice of Spain, impoliteness, language as evidence, language crimes

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1. Introduction

The investigation of language crimes is one of the expert areas of forensic linguistics as a forensic science. In this paper, we deal with defamation: the all-encompassing legal term for a communication or publication of a false statement to a third party which causes damage to another person's social prestige and reputation. In the laws of many countries, defamation is defined either as a civil tort or as a criminal offence. In other words, the defendant can either be sued for compensation by the plaintiff or be criminally prosecuted by the State. In common law jurisdictions, such as the United States, United Kingdom, Canada (with the exception of Quebec, which has a plural legal system), Australia, and Ireland, defamation is mainly a civil tort. By contrast, in civil or continental law jurisdictions, such as Germany, Austria, the Netherlands, Denmark, France, Italy, Greece, Portugal, and Spain, defamation can be considered a criminal offence. In this context, it is noteworthy to mention that the Council of Europe has recently taken various steps to protect the individual's right to freedom of expression by promoting the decriminalisation of defamation.¹ In other parts of the world such as Asia, defamation is also regarded as a criminal offence in Japan, which is primarily a civil law jurisdiction, and in the People's Republic of China, whose legal system is a combination of civil law and socialist law.

This paper focuses specifically on the analysis of defamation cases in the High Courts of Justice of Spain.² Under Art. 18 of the Spanish Constitution, defamation is an offence that infringes the fundamental rights of citizens to honour, privacy, and self-image. According to the Spanish Penal Code, hereinafter PC, defamation can be either a criminal offence (*calumny*) (Arts. 205–207) or a civil tort (*injury*) (Arts. 208–210). In either case, the offence is perpetrated primarily by means of malicious language use—either written language (libel), spoken language (slander), or *technospeech*³ (Garfield 2011: 17)—involving intentional false communication aimed at damaging a person's honour and dignity (Haiman, 1970; Phelps & Hamilton, 1969; Sack, 1999). In Spanish penal law, the victim (plaintiff) can bring a claim against the offender (defendant) for defamation, if conciliation was not possible. The court process involves two main stages. Firstly, the plaintiff must answer four questions:

- (1) Do the words complained of have a defamatory meaning?
- (2) Do the words refer to the plaintiff?

¹ *Decriminalisation of defamation: Council of Europe guidance on proportionality of laws and conformity with human rights* (13th July 2018), available at coe.int/en/web/freedom-expression/-/decriminalisation-of-defamation-supported-by-the-council-of-europe-through-guidance-on-proportionality-of-laws-and-their-conformity-with-human-rights (accessed 16 August 2019). A summary of the resolutions, recommendations, studies and declarations can be examined in the Council of Europe leaflet on *Defamation*, available at rm.coe.int/leaflet-defamation-en/168079ceca (accessed 16 August 2019).

² Spain has a civil law system based on comprehensive legal codes and laws rooted in Roman law.

³ Forms of digital communication such as text messaging and tweeting are referred to as *technospeech* by Garfield (2011: 17).

- (3) Was the defendant responsible for publishing them?
- (4) Was the message communicated to a third party or published?

Secondly, when these issues are settled, the burden of proof shifts to the defendant, who must persuade the court that the defendant's opinion or report was grounded in true facts or was privileged, i.e. the person making the statement had the absolute right or partial right to make the statement at that time. In case of unintentional defamation, the defendant may mitigate damages or escape liability by offering an apology. Since linguists are specialists in language, their expertise can be central to the analysis of the spoken or written material that caused the alleged defamation. In Spain, the service of an expert linguist may, if at all, be called upon by the contending parties or by the court in cases of defamation involving *conversational implicatures* (Grice, 1957: 377–388), which are referred to as *innuendo meanings* in defamation law. These are defined by Durant (1996: 2) as “[...] expressions which are not defamatory at face value, but which nevertheless carry discreditable implications to those with specialized, rather than general, knowledge.” Consequently, the question for the expert linguist is most likely to be whether a statement is reasonably capable of carrying a defamatory meaning.

Here, we analyse defamation as a language crime within the theoretical framework of sociopragmatics, with special reference to the theory of *impoliteness* (Bousfield, 2008; Culpeper, 2011; Spencer-Oatey, 2000, 2005: 95–119) for the reason that intentionality, face-attack, and face loss are key elements that bring together affective impoliteness and defamation.

2. Related Work

Since the 1980s, linguists have tried to shed light on different aspects of defamation from various linguistic theories. In what follows, we will refer to what we view as some of the major linguistic contributions to the analysis of defamation as a language crime.

Hancher (1980: 245–256) suggested analysing defamation through the scope of *speech acts*, a theory introduced by Austin (1962) and Searle (1969, 1979, 1983) and later expanded by other philosophers of language. In particular, Hancher drew attention to speech act theory as a relevant linguistic working tool for the analysis of the law, and more specifically of defamation. According to speech act theory, every utterance comprises two acts: an illocutionary act and a perlocutionary act. Whereas the *illocutionary act* refers to the utterance's illocutionary force or intended meaning, the *perlocutionary act* refers to the effect of the utterance on the hearer. Hancher concentrated on the linguistic concepts of *uptake* and *intent to communicate*. Uptake (Austin, 1962: 22, 116) is one of the prerequisites for an illocutionary act to be felicitous (to be performed with success). Likewise, a requirement of uptake is basic to the law of defamation.

In other words, a defamatory speech act must be heard and understood correctly by the recipient to become a basis of litigation. Drawing on speech act theory, Hancher (1980: 246) listed the five intentions with which a person will normally speak: (1) to speak (*utterance act*), (2) to express meaning and refer to one person rather than to another (*propositional act*), (3) to communicate intent (*illocutionary act*), (4) to be heard and understood correctly by the recipient (*to secure uptake*), and (5) to harm the reputation of the recipient (*perlocutionary act*). According to Hancher,

“the propositional, illocutionary and perlocutionary intentions do not matter; they can be perfectly innocent, and yet the defendant may be guilty, because he had the intent to communicate.” (1980: 246)

Hence, the intent to communicate comprises the intent to perform an utterance act plus the intent to secure uptake. In this context, it is important to note that even when there is misunderstanding on the part of the hearer regarding the utterance’s illocutionary force, this is enough for the purposes of the law. By contrast, when uptake does not occur, or it occurs unintentionally (Hancher, 1980: 247), there is no defamation case.

Tiersma, who was both a law professor and a linguist, attracted the attention of legal professionals to a significant issue:

“while many significant problems that lawyers and judges confront are fundamentally linguistic, their approaches to these problems usually ignore linguistic learning that might be helpful.” (Conley, 2015: 168)

In his seminal article “The language of defamation” (1987: 303–350), Tiersma applied his linguistic knowledge and expertise in speech acts to the analysis of defamation statutes, making a relevant contribution to both law and linguistics, as stated by Shuy (2015: 171). Tiersma suggested that defamation should be understood not only in terms of the perlocutionary effect on the receiver of the offensive message, namely the harm caused to his reputation and prestige in the social community, but also in terms of the illocutionary force of the utterance that reflects the speaker’s intent.

In doing so, Tiersma’s work suggested making a shift in the focus of the law of defamation from the damaging effects of a writer’s (or speaker’s) statement on the receiver to the statement’s illocutionary force. He argued that a more precise analysis suggests defining defamation as the *illocutionary act of accusing*. As explained by Tiersma (2015: 159–161), an utterance has the illocutionary force of accusation when its propositional content attributes responsibility to someone for a blameworthy, discreditable, or reprehensible act, according to the social norms of the community (Kredens, 2015: 175–179). Consequently, a speaker (or writer) defames if s/he accuses without privilege to do so or in violation of the values, moral standards, and social norms of the speech community that regulate accusations, i.e. the target did not actually commit a blameworthy act.

The problem, however, lies in the fact that since offenders do not normally announce the illocutionary force of an accusation by using the performative verb “accuse” in their utterances, but rather perform the accusation indirectly, e.g. as an indirect speech act (Searle, 1979: 30–37), to avoid social accountability, the analysis of defamation cases involves inquiring into the speaker’s intent in making the utterance, namely analysing

whether the offender was attempting to attach responsibility to somebody for a discreditable act or state of affairs or, on the contrary, was merely reporting facts or giving an opinion (Tiersma, 2015: 160). Determining the speaker's intent is not possible for any science, for the simple reason that researchers cannot sneak into the minds of speakers or writers to know with any degree of certainty what they intended. However, we agree with Shuy when he drew our attention to the fact that:

“Recognizing the ways that speech acts operate in language can even provide clues to a person's intentions, which can enable the courts to better distinguish between defamatory accusations and reports that merely inform readers of a state of affairs or opinions about the author's state of mind.” (2015: 172)

Intentionality in the speech act can then be accessed by analysing whether or not it meets a set of felicity conditions, i.e. the conditions and the criteria that must be satisfied for a speech act to achieve its purpose (Searle, 1983: 28). Tiersma's contribution to the linguistic analysis of defamation through the scope of speech acts has been decisive to better understand the major doctrines of defamation. In other words, the actual malice standard, the fair report privilege, and the fact-opinion distinction indicate an implicit understanding of defamation as the illocutionary force of accusing.

Durant's work (1996: 195–210) focused on the analysis of the defamatory meaning of the statement rather than on the speech act performed. He presented an account of the evidence he provided in an English libel action in 1992 regarding the meaning of the expression “economical with the truth” which, as it takes the form of a quote, poses difficulties to legal interpretation. Durant proposed a hybrid research method combining semantic analysis with pragmatic analysis. His discussion on semantic and pragmatic evidence suggested that the linguist can valuably narrow the scope of plausible interpretations of contested expressions and may also contribute to a more general understanding of both the *ordinary reader* and *innuendo* tests of meaning. Durant also delineated emergent tendencies in the related fields of forensic linguistics and critical legal studies that time has consolidated, as shown in the work of Giltrow & Stein (2017).

The last two relevant contributions to the analysis of defamation as a language crime we refer to here are those by Kniffka (2007: 113–148) and Shuy (2010). Whereas the former offered an interesting insight into defamation from a German legal perspective and proposed discourse analysis as a linguistic working tool for the analysis of defamatory meaning, the latter explained and illustrated through a selection of twelve exemplary cases the way linguistics fits into the analysis of defamation. More specifically, Shuy drew attention to the different linguistic working tools that are relevant for the analysis of defamatory messages, e.g. grammatical referencing, speech acts, conveyed meaning, intentionality, malicious language, discourse structure, and framing.

3. Aims and Research Questions

The aims of this paper are threefold. Firstly, we analyse the way the theory of *impoliteness* can help better identify the distinguishing features of defamation as a language crime. Secondly, we examine the methods by means of which the High Courts of Justice of Spain appraise defamation. Thirdly, we look at the impact that conventionalised formulaic impoliteness and non-conventionalised impoliteness (*implicational impoliteness*) may have on court verdicts for defamation cases. The questions we discuss are: (1) Is the theory of impoliteness appropriate for evidencing actionable offence in cases involving defamation? (2) How do the High Courts of Justice of Spain appraise defamatory meaning? (3) Does conventionalised formulaic impoliteness promote guilty verdicts? And (4) Does non-conventionalised impoliteness support acquittals?

4. Methodology

4.1. The Corpus

To avoid building a castle in the sky, this piece of research grounds in empirical data, particularly in 150 judgments for cases of defamation given by the High Courts of Justice of Spain between 2013 and 2017. The cases were searched with CENDOJ,⁴ which is the open access browser of case law of the *Centre for Judicial Documentation (The Cendoj)*⁵, and were randomly selected. The corpus gave the author indirect access to problematic and well-documented cases of defamation, e.g. the legal discussion leading to the final upholding or rejection of previous court decisions in the process by the High Courts of Justice, e.g. the Provincial Court or the Supreme Court. To the best of our knowledge, in none of the cases examined was an expert linguist called upon by the court.

4.2. The Method

Firstly, the 150 judgments were analysed in terms of different functional categories such as: (a) type of defamation under the Spanish PC (calumny or injury), (b) publicity (absent or present), (c) defamatory meaning (conventionalised formulaic impoliteness or non-conventionalised impoliteness), and (d) verdict (guilty or acquittal).

Secondly, we considered the social emotions involved in each case through a frame consisting of four steps: (a) affective impoliteness, (b) appraisal of behaviour in context,

⁴ Available at poderjudicial.es/search/indexAN.jsp.

⁵ Available at poderjudicial.es/cgpj/en/Judiciary/General-Council-of-the-Judiciary/Institutional-information/What-is-the-CGPJ-/Headquarters/The-Cendoj--Centre-for-Judicial-Documentation--.

(c) activation of impoliteness attitude schemata, and (d) activation of impoliteness-related emotion schemata.

Thirdly, we analysed the content of the defamatory messages with the following sociopragmatic tools: (a) context, (b) intentionality, (c) face attack, (d) face-threatening act, (e) face loss, and (f) face damage.

Finally, the Pearson Chi-squared independence test⁶ was performed, for purposes of analysing whether the type of impoliteness strategy in which the defamatory message was packaged had an impact on the court verdict.

5. The Theory of Impoliteness, Emotion, and Offence

Impoliteness is a multidisciplinary field of research that has attracted the attention of specialists from varied disciplines. Social psychologists have mainly dealt with aggressive behaviour. Sociologists have explored the effects of social abuse. Specialists in conflict studies have analysed interpersonal and social conflict. And linguists doing research anchored in the field of sociopragmatics have focused on linguistic impoliteness, i.e. the use of language in conflict interactions, as shown in works by Spencer-Oatey (2000, 2005: 95–119), Culpeper (2011), and Bousfield (2008). Whereas linguistic politeness behaviour relates to the individual's use of strategic language for face-saving purposes (Brown & Levinson, 1987 [1978]; Lakoff, 1973; Leech, 1983; Watts, 2003), linguistic impoliteness behaviour relates to the individual's use of strategic language for face-threatening purposes, e.g. to threaten harmonious social relations (Spencer-Oatey, 2000: 3). Impoliteness occurs, as explained by Culpeper (2011: 19),

“when: (1) the speaker communicates face-attack intentionally, or (2) the hearer perceives and/or constructs behaviour as intentionally face-threatening, or a combination of (1) and (2)”.

At the core of the theory of impoliteness is the sociological Chinese concept of *face*, which involves two sides. On the one hand, there is an innate, subjective, personal sense of dignity. On the other hand, there is a transcendent sense of dignity in social contexts. While the former relates to the individual's social standards of morality and behaviour

⁶ In statistics, the Pearson Chi-squared independence test is used to determine whether there is a statistically significant relationship between two nominal (categorical) variables. Traditionally, the data are displayed in a contingency table where each row represents a category for one variable and each column represents a category for the other variable. For example, in this piece of research, the Pearson Chi-squared independence test is used to analyse the relationship between the type of impoliteness strategy in which the defamatory message was packaged (direct vs. indirect) (variable X) and the court verdict (acquittal vs. guilty) (variable Y). Whereas the null hypothesis for this test is that there is no relationship between the two variables (the variables are independent), i.e. the type of impoliteness strategy has no impact on the court verdict; the alternative hypothesis is that there is a relationship between the two variables (the variables are dependent), i.e. the type of impoliteness strategy has an impact on the court verdict.

(*lian*), the latter relates to the individual's status, prestige, and reputation (*mianzi*). *Face saving* describes the lengths that individuals may go against *face attack* for the preservation of their personal dignity, social reputation, and prestige in the community. *Face-threatening acts* are, then, those that damage the face of the victim, producing *face loss*. These can be verbal, para-verbal (tone, inflection, etc.), or non-verbal (facial expression, gesture, posture, etc.). At a minimum, one of these acts must be associated with the statement (or utterance). Brown & Levinson (1987 [1978]: 65–67) made a relevant distinction between acts that threaten negative face and those that threaten positive face. Negative face is threatened by acts indicating that the speaker does not intend to avoid impeding the addressee's freedom of choice and action, e.g. threats, warnings, orders, expressions of strong (negative) emotions toward the addressee, such as hatred, anger, disgust, etc. In contrast, positive face is threatened by acts indicating that the speaker does not care about the addressee's feelings, wants, etc., e.g. expressions of disapproval, criticism, contempt or ridicule, accusations, or insults.

The theory of impoliteness provides the linguist with an analytical frame with which one can describe and explain the social emotions associated with offence and moral damage (Dewaele, 2015: 357–370; Foolen, 2016: 241–256; Haidt, 2003: 852–870; Hareli & Parkinson, 2008: 131–156; Reeck et al., 2016: 47–63; Shaver et al., 1987: 1061–1086; Thomson & Alba-Juez, 2014). Unlike basic emotions such as happiness or sadness, which essentially require awareness of one's own somatic state, social emotions, which are related to societal norms and rights, require the representation of the mental state of other people. The impoliteness frame comprises three steps:

- (1) appraisal of behaviour in context,
- (2) activation of impoliteness attitude schemata, and
- (3) activation of impoliteness-related emotion schemata.

To illustrate this, let us consider two different situations. Displaying emotions such as contempt or anger at somebody does not necessarily involve an offence; by contrast, somebody displaying great contempt for and anger at somebody, and doing so publicly, may be judged (*appraisal of behaviour in context*) to have acted in an inappropriately and unfairly hurtful way (*activation of impoliteness attitude schemata*), causing an emotional reaction such as embarrassment, shame, pain, or anger in the target (*activation of impoliteness-related emotion schemata*). It is precisely the negative emotion, e.g. shame, humiliation, anger, etc., evoked in the target that triggers the possibility of bringing a claim for compensation of damage of a moral nature, if the speaker's abusive behaviour is to be considered an actionable offence under the law. The target of defamation, in our view, constructs offence through a bottom-up process consisting of the following steps:

- (1) appraisal of behaviour in context,
- (2) activation of impoliteness attitude schemata,
- (3) activation of impoliteness-related emotion schemata,
- (4) appraisal of actionable offence, and
- (5) claim for compensation of damage of a moral nature.

6. Spanish Defamation Law within the Framework of the Theory of Impoliteness

The law guarantees and protects the fundamental rights of individuals to honour, privacy, and self-image that can be affected by social emotions (Guillén-Nieto & Stein, 2019: 235–262; Hareli & Parkinson, 2008: 131–156; Reeck et al., 2016: 47–63) such as anger, rage, contempt, envy, hatred, humiliation, etc. Specifically, in Spanish civil law, defamation is an offence that does not only infringe the right to honour laid down in Art. 18 of the Spanish Constitution (1978)⁷ and in Organic Act 1/1982 of 5th May on Civil Protection of Honour and Dignity,⁸ but also poses limitations to the right to freedom of expression laid down in Art. 20 of the Spanish Constitution. Defamation law tries to balance competing interests. On the one hand, people should not ruin others' lives by telling lies about them; on the other hand, people should be able to speak freely without fear of litigation over petty insults or insignificant disagreements (Ardia, 2013: 1–84).

Within the theoretical framework of impoliteness, the expert linguist can describe different case scenarios related to potentially offensive behaviour, analyse what the offensive language conveys in alleged defamatory statements, and provide linguistic scientific evidence of it. Needless to say, pointing out language clues is as far as expert linguists can go in their forensic reports, because it is the court that has the power to ultimately decide whether the statement was in fact defamatory:

- (A) (1) The speaker communicates face attack intentionally, and
(2) the hearer perceives or constructs the speaker's behaviour as face-threatening.
- (B) (1) The speaker communicates face attack unintentionally, and
(2) the hearer perceives or constructs the speaker's behaviour as face-threatening.
- (C) (1) The speaker communicates face attack intentionally, and
(2) the hearer does not perceive or construct the speaker's behaviour as face-threatening.
- (D) (1) The speaker communicates face attack unintentionally, and
(2) the hearer does not perceive or construct the speaker's behaviour as face-threatening.

According to defamation law, case scenario (A) may involve a defamation case, because the two preconditions for the crime are met: There must be a manifested intent on the part of the offender to damage the face of the target and the latter, in turn, must secure uptake, i.e. the offensive message must be heard and understood correctly as defamatory by the target in accordance with the social standards of morality and behaviour of the community. According to Malle (1997: 111–112), performing an action intentionally requires the presence of five components: a *desire* for an outcome, a *belief* that a particular action will lead to that outcome, an *intention* to perform the action, the *skill* to perform the action, and *awareness* of fulfilling the intention while performing the action.

⁷ Available at boe.es/buscar/doc.php?id=BOE-A-1978-31229.

⁸ Available at boe.es/buscar/act.php?id=BOE-A-1982-11196.

For example, let us consider the following case: an offender wants to ruin a target's reputation (*desire*); s/he then thinks that disseminating discreditable information on social media (*belief*) might accomplish the desire; s/he therefore decides to communicate such information (*intention*); s/he knows how to do so (*skill*); and s/he is aware of fulfilling her/his intention (*awareness*) while conveying the message.

Case scenario (B) would involve a defamation case, if the conflict were not resolved by conciliation, because uptake is secured by the target. It is important to note that speakers may perform speech acts intentionally with limited knowledge of what the effects of their actions will be. Unintentional perlocutionary acts highlight the fact that our utterances can bring about effects independently of our intentions. However, as Lassiter (2014: 45) pointed out, “[...] inability to foresee some consequence does not entail ascription of responsibility for that consequence.” In the case of unintentional defamation, the defendant may finally mitigate damages or escape liability by offering an apology to the target.

In case scenario (C), there is no defamation case because the target does not secure uptake, so the offence passes unnoticed. Following Lassiter (2014: 33), offenders may fail to bring about the intended perlocutionary effect on the target in two different ways. Firstly, the offender can intend to bring about the perlocutionary effect but the target does not hear/read properly or fails to understand correctly the offensive message. Secondly, the offender can intend to bring about the perlocutionary effect but does not have the necessary skill to achieve such a malicious purpose.

Finally, case scenario (D) illustrates a case in which impoliteness does not occur, because neither of the two preconditions for its accomplishment is met: (1) the speaker communicates face attack intentionally, or (2) the hearer perceives and/or constructs behaviour as intentionally face-threatening, or a combination of (1) and (2). Consequently, this case scenario also suggests that there is no defamation case.

In common law, defamation can be referred to as either *slander*, if the defamatory message was conveyed through speech, or *libel*, if the defamatory message was conveyed in writing. Spanish civil law discriminates between two different types of crimes related to defamation: *calumny* and *injury*. This distinction is based on the content of the defamatory statement (or utterance) rather than on the medium of expression used to convey the statement, as is the case in common law. Both calumny and libel can be expressed in speech, writing, or digital communication (Garfield, 2011: 17–56; Herring et al., 2013: 3–54; Lidsky, 2000: 855–946; Lidsky & Andersen, 2016: 156–178). In what follows, we will refer to each of them in turn in further detail. Calumny is laid down in *Title XI. Crimes against Honour. Chapter I. Arts. 205–207 (PC, p. 312)*:

Art. 205. Calumny is the imputation of a crime made with knowledge of its falsehood or reckless contempt for the truth.

Art. 206. Calumny shall be punishable by imprisonment from six months to two years or a fine of twelve to twenty-four months, if propagated with publicity and, in another case, with a fine of six to twelve months.

Art. 207. The person accused for the crime of calumny shall be exempt from all punishment by proving the criminal act attributed to another person.⁹

On the other hand, injury is laid down in *Title XI. Crimes against Honour. Chapter II. Arts. 208–210* (PC, 312–313):

Art. 208. Injury is the action or expression that damages the dignity of another person depreciating his/her reputation or injuring his/her self-esteem.

Only offences that, due to their nature, effects and circumstances, are held in the public concept as serious will be constitutive of crime.

Injuries that consist of imputation of facts shall not be considered serious, except when they have been carried out with knowledge of their falsehood or reckless contempt for the truth.

Art. 209. Serious abuse of widespread dissemination shall be punished by a fine from six to fourteen months and, in another case, from three to seven months.

Art. 210. The accused of injury shall be exempt from liability by proving the truth of the accusations when they are directed against public officials about facts concerning the exercise of their positions or referred to the commission of criminal offences or administrative infractions.¹⁰

From the perspective of the theory of impoliteness, we can say that calumny occurs when: (1) the speaker accuses the target (face attack), overtly or under cover, of having committed a crime (face-threatening act); (2) the accusation (the utterance's illocutionary force) is made with knowledge of its falsehood; and (3) the accusation produces a negative effect (perlocutionary effect) on the self-esteem, reputation, and social prestige of the target (face loss).

Similarly, we can say that injury occurs when: (1) the speaker accuses the target (face attack), overtly or under cover, of having done a blameworthy act (face-threatening act); (2) the accusation is made with knowledge of its falsehood; and (3) the accusation produces a negative effect on the self-esteem, reputation, and social prestige of the target (face loss).

The major difference between calumny and injury lies in the intensity of the crime the receiver is accused of. Whereas for the law calumny is a criminal offence (high-intensity crime), i.e. the offender accuses the target of having committed a crime, injury is a civil tort that may range from high-intensity to low-intensity types of offence, depending on the facts attributed to the target and the expressions used to damage his/her social reputation. In either case, the accusation is made with knowledge of its falsehood and publicity is always considered an aggravating factor. For example, penalties for the crime of calumny with publicity are imprisonment from six months to two years or a fine from twelve to twenty-four months. The crime of injury is punishable with a fine from six to fourteen months when the offence is serious and widely disseminated.

⁹ Translation of the source text in Spanish. *Código Penal*. 22nd ed. (2015), 312. Madrid: Tecnos. This edition includes the reforms of the Spanish Penal Code prompted by Organic Laws 1 and 2/2015, of 30th March, and Organic Law 4/2015, of 27th April.

¹⁰ Source see footnote 9, pp. 312–313.

7. Methods for the Appraisal of Defamation in the High Courts of Justice of Spain

For purposes of analysis, the sampled 150 judgments were classified into two major groups relating to the type of defamation laid down in the Spanish PC, i.e. calumny or injury. 79 % of the selected judgments were related to cases involving injuries, 17 % to cases involving calumnies, and only 4 % to cases involving both types of defamation. Additionally, publicity, which is considered an aggravating factor in Spanish defamation law, was present in 83 % of the defamation cases. As mentioned previously, the analysis of the corpus revealed that in none of the defamation cases the service of an expert linguist had been called upon by the court to determine whether the content of the message may carry defamatory meaning.

In this section, we analyse the methods used by the High Courts of Justice of Spain to appraise defamation. On analysing the selected sample of 150 judgments, we found that the court must deconstruct the offence constructed by the plaintiff (bottom-up process). For purposes of delivering a judgment, the court must go through an inverse analytic and interpretive process (top-down process). This may involve the following steps:

- (1) claim for compensation, e.g. facts in use and legal reasons for decision,
- (2) appraisal of actionable offence,
- (3) activation of impoliteness-related emotion schemata, e.g. the negative emotions evoked in both the offender and the target,
- (4) activation of impoliteness attitude schemata, e.g. the offender's presumed abusive behaviour, and
- (5) appraisal of behaviour in context.

As it occurs in other expert areas of forensic linguistics such as trademarks disputes (Guillén-Nieto, 2011: 63–83), legal practitioners use their natural linguistic knowledge to analyse language matters. Besides, Spanish courts seem to show preference for the appraisal of abusive behaviour in context. Consequently, we can say that their methodological approach to the analysis of defamatory meaning is context-based (Giltrow & Stein, 2017) rather than sentence-based. More precisely, Spanish High Courts of Justice make a rough reference to the following contextual factors in their legal reasonings:

- (1) The situation and circumstances in which the offence was made.
- (2) The social context (Halliday, 1985), i.e. the interlocutors involved and their social relationship, their topic or topics of conversation when the offence was made, and the medium through which the message was conveyed, e.g. speech, writing, or digital communication.
- (3) The linguistic context (co-text).
- (4) The pragmatic context (Kecskés, 2014: 128–199), i.e. common ground, salience, and intentionality.
- (5) The legal context, i.e. the laws applicable, the doctrine, the jurisprudence, and the specific legal technicalities at work. For example, it must be proved that the offender authored the defamatory message and was responsible for its publication, the offence must be laid down in the PC, and must not be time-barred.

Additionally, the High Courts of Justice appraise moral damage to the victim within the legal framework of Spanish defamation law. For instance, not every offence implying face damage is a crime by law. Precisely, minor injuries, low-intensity insults, degrading expressions, and cross-accusations with no public significance were decriminalised by law in 2015. The analysis of the corpus also revealed that these courts apply weighting techniques in their legal reasonings. In other words, they seem to favour the prevalence of the rights to expression and information over the right to honour when the alleged defamatory statement is based on facts and does not include high-intensity insults, degrading expressions, or false accusations. Finally, once the relevant facts in the case are confirmed and the legal reasoning for decision analysed, the High Courts of Justice give a final judgment, either upholding the verdict of the preceding court or rejecting it.

In the next subsections, we illustrate the way intentional defamation was analysed by the High Courts of Justice of Spain through a selection of five representative defamation cases extracted from the corpus. The criteria used to select these cases were: (a) the type of defamation, (b) the medium used for the dissemination of the defamatory statement, e.g. rumour, mass media, and social media, and (c) the impoliteness strategy used to package the defamatory statement, e.g. conventionalised formulaic impoliteness vs. non-conventionalised impoliteness (implicational impoliteness).

7.1. Defamatory Messages Disseminated through Rumour

The author had indirect access to the case through Court decision N° 234/2013¹¹ given by the Supreme Court in Madrid. The defendants were apparently behind a whispering campaign against the plaintiff, who belongs to a renowned and eminent family in a local village in Spain. Rumours were spread that the plaintiff had abused a child in the village some time before. This is, therefore, a case involving oral defamation (*slander*) performed with a type of malicious language known as *rumour*, namely a story or piece of information that may or may not be true, but that is widely disseminated with no discernible source. The defamatory message was mostly conveyed by means of conventionalised formulaic impoliteness evoking negative emotions in the plaintiff such as shame and humiliation. Since the story attributed to the plaintiff the commission of an actionable offence in law (child abuse), the supposed defamation was considered a case of calumny that had to be proven before the court. The defendants were condemned for the crime of defamation (calumny) by both the first instance and the second instance courts. As a result, they filed an appeal in cassation (N° 985/2011) in the Supreme Court, infringement of their rights to freedom of expression and information. The Supreme Court re-examined the previous court decision and confirmed that this was a case of intentional defamation for several reasons. First, the intention of the defendants was to

¹¹Id Cendoj: 28079110012013100315.

accuse (illocutionary force) the plaintiff of having committed a crime in the past (face-threatening act). Second, the plaintiff secured uptake of the defamatory rumours. Third, the defamatory content was widely disseminated among the village citizens. Fourth, since the defendants were not able to provide any evidence to support their accusation, this was considered false and consequently it was settled that there had been no infringement of the right to freedom of expression. Fifth, the goal of the defendants, possibly driven by envy and hatred towards the target, was to damage his personal dignity, social reputation, and prestige in the local village (face loss). The result was that the Supreme Court confirmed that the plaintiff's right to honour had been infringed. The appeal in cassation filed by the defendants was finally dismissed, and the guilty verdict was upheld.

7.2. Defamatory Messages Broadcasted through Mass Media

In this subsection, we discuss two cases involving calumny by means of mass media. The first case was accessed through Court decision N° 71/2017¹² given by the Provincial Court in Zaragoza. The defendant stated in a TV show that the Civil Guard in Spain blackmails people and fabricates false accusations against citizens. The alleged defamatory statement was: “The same Civil Guard, their buddies, made me leave a speedball¹³ in the personal belongings of a citizen from Borja”.¹⁴ The case involves oral defamation (slander) disseminated through mass media. The content of the statement pronounced by the defendant accused (face-threatening act) the plaintiff (the Civil Guard in Spain) of extortion, an actionable offence by law, evoking the negative social emotion of shame in the latter. Consequently, the case pleaded before the court was related to calumny. As the defendant was acquitted of the crime of defamation (calumny) by the court of first instance, the plaintiff (the Civil Guard) filed an appeal in the Provincial Court. For the Provincial Court, this was not a case of intentional defamation for the following reasons. First, although the body of the Civil Guard in Spain secured uptake of the presumed defamatory utterances broadcasted through TV, this was not addressed to any specific official(s). Second, the defendant was able to provide the necessary evidence to support the veracity of his utterances, which did not include high-intensity insults or derogatory terms. Third, it was demonstrated that an important piece of evidence had been omitted in the plaintiff's claim: after pronouncing the alleged defamatory utterance, the defendant had immediately shown to the TV camera the judgment condemning a civil guard for the crime of extortion. Fourth, the defendant was thought to be reporting on true facts. The Provincial Court dismissed the appeal (N° 160/2017) filed by the plaintiff, and

¹² Id Cendoj: 50297370032017100062.

¹³ In drug-related slang, a *speedball* refers to a combination of heroin and cocaine.

¹⁴ Translation of the source text in Spanish: “La misma Guardia Civil, compañeros de ellos, me obligaron a meter una bola de droga a un ciudadano de Borja”.

the contested judgment of the court of first instance was upheld. In this case, the rights to freedom of expression and information prevailed over the right to honour.

The second case we analyse was accessed through Court decision N° 312/2013)¹⁵ given by the Supreme Court in Madrid. In the midst of a political campaign, the main opponent of the Mayor of a local town pronounced the following utterance in a press conference and his words were broadcasted on TV: “Not long ago the Mayor of Vinarós¹⁶ was invited to go on a trip to New York by the printing house of Vinarós’ weekly¹⁷”. Although the message did not include high-intensity insults or derogatory terms, the word “invited” was understood as intentionally offensive by the plaintiff because, in their opinion, it suggested via innuendo an accusation of bribery and corruption (non-conventionalised impoliteness strategy). Consequently, it was claimed that there was infringement of the Mayor’s right to honour, as well as damage to his social reputation and prestige as a public figure. Interestingly, the legal discussion in this case focused on the illocutionary force of the utterance. The verb “to invite” can be used with two main meanings: (1) to offer an incentive, and (2) to request the presence or participation of somebody. Although the defendant stated that he had used the term with the second meaning, for the court the first meaning was more salient (Kecskés, 2014: 176–199) in this linguistic context or co-text, because the questioned utterance was framed by the defendant’s explicit reference to different cases involving political corruption. For the court of first instance and the Provincial Court, the defendant’s utterance implied an accusation of bribery, and so there was infringement of the right to honour of a public figure. The defendant was found guilty and condemned for calumny. As a result, he filed an appeal in cassation in the Supreme Court in Madrid, alleging infringement of his rights to freedom of expression and information. As the veracity of the content of the allegation was proved, the appeal in cassation was admitted and the contested Provincial Court judgment annulled. The rights to freedom of expression and information prevailed over the right to honour in this case. The defendant was thought to be reporting on true facts rather than making a false accusation against the plaintiff.

7.3. Defamatory Messages Disseminated through Social Media

Social media have given rise to the emergence of digital genres (Georgakopoulou, 2013: 695–715; Giltrow, 2013: 717–737; Herring et al., 2013: 3–54) and their related cybercrimes, e.g. deception and fraud (Eggington, 2008: 249–264; Gill, 2013: 411–436; Hancock & Gonzalez, 2013: 363–383; Heyd, 2013: 387–409), threats (Muschalik, 2018), discrimination (Stollznow, 2017), etc. In this subsection, we discuss two cases in which women were

¹⁵ Id Cendoj: 28079110012013100343.

¹⁶ For purposes of personal protection data, “Vinarós” is a fictional name.

¹⁷ Translation of the source text in Spanish: “No hace mucho se fue el alcalde de Vinarós a Nueva York invitado por la empresa que imprime el semanario de Vinarós”.

defamed by their partners on social media. Unlike other means of expression of defamatory messages, digital communication on social media presumes intentionality and ensures that uptake is secured by the receiver, because it is considered the most far-reaching form of communication to date.

Moreover, defamation on social media draws our attention to cyberviolence against women, a later development of gender violence, in societies in which patriarchal values are deeply rooted in the minds of the people and exacerbated through social and discursive practices. It is often the case that when the victim tries to empower herself or break up with the offender, he will then try to regain power and control over her in the domestic unit by using different strategies, ranging from psychological violence to force, whose purpose is to influence her decision-making and lead to the resumption of the relationship.

In the latest modification of the PC (Organic Law 1/2015 of March 30th), the law provides victims of gender-based violence with special protection measures in line with the recommendations resulting from the Istanbul Convention (the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence¹⁸). Some of the most important changes are, for example, the reinforcement of the penal sanctions for insults in cases involving gender violence (Art. 173.2); and the inclusion of two new crimes: *stalking* (Art. 172b), which involves the usage on the part of the perpetrator of a variety of strategies to regain control and dominance over the target victim; and *sexting* (C. 7, Art. 197), i.e. the dissemination of intimate images obtained with consent of the victim but without authorisation for their dissemination.

The first case we examine in this subsection shows intentional defamation on Twitter. The author had access to the case through Court decision N° 454/2015¹⁹ given by the Provincial Court in Murcia. The defendant had apparently written two defamatory tweets: (1) “You’re still the same bitch”,²⁰ and (2) “Don’t think that it is so easy to break up with me, I have an invisible soul and a 38 hidden”²¹. In this case, the offender employed both conventionalised formulaic impoliteness and non-conventionalised impoliteness. Each tweet contained a different face-threatening act against the plaintiff:

(1) An insult (conventionalised formulaic impoliteness): “You’re still the same bitch”. This consists of an offensive word and a personalised negative assertion including the subjective indicator (“the same”) and the intensifier “still”. The insult evoked negative social emotions in the plaintiff, specially humiliation and shame (face loss), damaging her self-esteem and social prestige.

¹⁸ Available at rm.coe.int/168008482e.

¹⁹ Id Cendoj: 30030370032015100436.

²⁰ Translation of the source text in Spanish: “Sigues siendo la misma puta”.

²¹ Translation of the source text in Spanish: “No pienses que es tan fácil poder acabar conmigo, tengo el alma invisible y un 38 escondido”.

(2) An indirect threat (non-conventionalised impoliteness): “Don’t think that it is so easy to break up with me, I have an invisible soul and a 38 hidden”. The plaintiff understood by way of conversational implicature (innuendo meaning) that the defendant would commit an offensive action against her if she broke up with him, e.g. he would shoot her with a .38 handgun.

The defendant was condemned by the court of first instance for the civil tort of injury. However, he filed an appeal (Nº 80/2015) to the Provincial Court of Justice in Murcia claiming that he had not authored nor was he responsible for the publication of the tweets in question. The appeal was admitted, and the contested first court of instance judgment was finally annulled because of a legal technicality: It was not finally proved that the defendant had authored the tweets, and he therefore could not be declared guilty for infringement of the plaintiff’s right to honour.

The second example in this subsection shows another case of intentional defamation on social media. The judgment given by the Penal Court in Pamplona (Court decision Nº 310/2015)²² provided the author with access to the case. Probably driven by anger, the defendant, who was divorcing the plaintiff, opened a new account on Facebook for the plaintiff that she was not aware of. After having copied in the fake Facebook profile the list of friends from the original Facebook account, he published sexually suggestive pictures of the plaintiff that were seen by her relatives and friends.

It is noteworthy that because of its great dissemination power, digital communication makes it easier for the court to judge relevant issues such as intentional defamation, uptake, and the ultimate goal of damaging the target’s personal dignity and social reputation. Significantly, the case did not include the publication of offensive words but rather consisted of an offensive action known as *sexting* (PC, C. 7 Art. 197), i.e. the dissemination of intimate images obtained with consent of the victim but without consent to their dissemination. The discourse frame fabricated by the offender ensured that anyone seeing the explicitly sexually suggestive pictures of the target would interpret by way of conversational implicature (innuendo) that she had a double life as a call girl.

The defendant was condemned by the court of first instance for the crime against moral integrity laid down in Art. 197 of the PC on the grounds that the plaintiff’s right to honour had been infringed. However, the defendant filed an appeal (Nº 248/2015) to the Penal Court in Pamplona claiming that he had not authored and was not responsible for the offensive action. Because authorship was proven in this case, the appeal was dismissed by the Penal Court, and so the contested first court of instance judgment was upheld.

²² Id Cendoj: 31201510042015100016.

8. The Impact of Impoliteness Strategies on Courts' Verdicts for Cases of Defamation

Typically, the offender may use two types of impoliteness strategies to convey defamatory meaning. These are: (1) conventionalised formulaic impoliteness, e.g. formulaic idioms (Culpeper, 2011: 113–154); (2) non-conventionalised impoliteness (implicational impoliteness), e.g. specialised allusions and innuendo meanings (Culpeper, 2011: 155–194); or both (1) and (2). In the former, defamatory meaning is explicitly conveyed and requires no interpretative effort on the part of the receiver; in the latter, defamatory meaning is implicitly conveyed by way of implicature (Grice, 1957: 377–388) and therefore requires an extra interpretative effort. It is for the court to decide whether the text in question does in fact bear such a defamatory meaning in the case pleaded before them.

We will now move on to consider the impact of impoliteness strategies on court verdicts for cases of defamation in the selected corpus of 150 judgments. Whereas conventionalised formulaic politeness was present in 85 % of the cases, non-conventionalised impoliteness (implicational impoliteness) was present in only 12 % of the cases. The absolute predominance of conventionalised formulaic impoliteness over non-conventional impoliteness (implicational impoliteness) in the 150 judgments examined may invite different interpretations.

Firstly, Spaniards seem to favour conventionalised formulaic impoliteness when defaming over non-conventionalised impoliteness.

Secondly, Spanish courts happen to admit more cases in which defamation is encapsulated in conventionalised formulaic impoliteness than those in which it is packaged in non-conventionalised impoliteness.

The percent distribution of the type of verdict in the selected defamation case corpus yielded a curious result: Whereas half of the verdicts were acquittals (50 %), the other half were guilty verdicts (50 %). The Pearson Chi-squared independence test yielded no results, because of the prevalence of conventionalised formulaic impoliteness in the corpus examined. This was highly present in both acquittals and guilty verdicts. The scarce presence of specialised allusion and innuendo meanings suggests that this may be considered an elusive defamatory strategy because the evidence may not be strong enough to build a defamation case.

However, matters other than the way the meaning is conveyed were found to have more impact on the court verdicts for cases of defamation, e.g. the professional status of the target victim, the public significance of the offence, the widespread dissemination of the defamatory statements, the falsehood of the statements, and the application of protective legal measures against gender violence and its later development, cyberviolence against women.

9. Conclusions

In this paper, we examined defamation as a language crime within the framework of impoliteness theory (Bousfield, 2008; Culpeper, 2011; Spencer-Oatey 2000, 2005: 95–119). The study pioneers the application of impoliteness to the study of defamation as a negative discursive practice. This approach, which goes far beyond the utterance level of linguistic analysis, is in line with the emerging trend in impoliteness studies toward the realm of discursive pragmatics (Garcés-Conejos Blitvich & Sifianou, 2019: 91–101) and highlights the type of scientific linguistic evidence that may be provided to the court by the expert linguist. The research is grounded in the analysis of a reference corpus of 150 judgments given by the High Courts of Justice of Spain between 2013 and 2017. In none of the cases analysed was the service of an expert linguist called upon by the court. Consequently, the analysis of defamatory language was done by legal practitioners drawing on their natural knowledge of language and intuition about intentionality and meaning.

With reference to impoliteness as a linguistic working tool for the analysis of defamation, we conclude that this is appropriate for evidencing actionable offence in law. The study demonstrated that the theory of impoliteness provides the expert linguist with an all-inclusive sociopragmatic categorisation of offence, e.g. face, intentionality, face attack, face-threatening act, impoliteness strategies (conventionalised formulaic impoliteness or non-conventionalised impoliteness), face loss, and face damage, as well as with a scientific description and explanation of the processes involved in the construction and deconstruction of offence. These are: (a) a bottom-up process through which the victim perceives and constructs the offender's intentionally face-threatening behaviour; and (b) a top-down process through which the court deconstructs and appraises the alleged offensive behaviour in context and within the framework of a specific legal culture and system, (Spanish civil law).

Therefore, legal practitioners use their natural knowledge of language to analyse defamatory meaning in context; more specifically, they examine, in a rather intuitive way, contextual factors such as the situation, the participants involved, the linguistic context, and the pragmatic context, and interpret defamation within Spanish defamation law. In this respect, findings from this study showed that in the High Courts of Justice of Spain, not every offence implying face damage is a crime by law; minor injuries, low-intensity insults, and cross-accusations with no public significance were, in fact, decriminalised by law in 2015. Moreover, these courts apply weighting techniques in their legal reasonings. Specifically, they seem to favour the prevalence of the rights to freedom of expression and information (Art. 20, Spanish Constitution) over the right to honour (Art. 18, Spanish Constitution), when the alleged defamatory statement is based on true facts and does not include high-intensity insults or degrading expressions.

This paper also addressed the impact of impoliteness strategy (conventionalised, formulaic impoliteness or non-conventionalised impoliteness) on the court verdict. The statistics performed yielded no results, for two major reasons. Firstly, the percent of

cases packaged in conventionalised formulaic impoliteness was overwhelmingly high in both groups of verdicts in the selected corpus: acquittals (50 %) and guilty verdicts (50 %).

Therefore, it was not possible to prove the impact this strategy may have on the court verdict. Secondly, the limited occurrence of non-conventionalised impoliteness in the corpus analysed was a major impediment for demonstrating the impact of this impoliteness strategy on the court verdict. The basic requirements for the performance of the Pearson Chi-squared independence test were not met, and this statistic therefore yielded no reliable results. The absolute prevalence of cases in which defamation was packaged in conventionalised formulaic impoliteness (85 %) over the cases in which defamation was packaged in non-conventional impoliteness (12 %) suggested meaningfully that the latter may be considered an elusive defamatory strategy, since the linguistic evidence may not be strong enough to build a court case of defamation. Factors other than the way the meaning is conveyed seemed to have more impact on the court verdict, e.g. the professional status of the target victim, the public significance of the offence, the widespread dissemination of the message, and the application of protective legal measures against gender-based violence and cyberviolence against women.

We hope the conclusions reached in this piece of research may contribute to a better understanding of the sociopragmatic foundation of defamation, the different strategies that offenders may use to encapsulate defamatory meaning, and the scientific assistance that expert linguists can provide the court in cases involving defamation.

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